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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES WHYTE et al.,

Plaintiffs and Appellants,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Defendant and Respondent.

G036814

(Super. Ct. No. 814593)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David Velasquez, Judge. Affirmed.

Law Offices of Federico Castelan Sayre, Federico Castelan Sayre and James F. Rumm for Plaintiffs and Appellants.

Marlin & Saltzman, Louis M. Marlin and Dale A. Anderson for Defendant and Respondent.

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This case arises from Marie Whyte’s decision to donate her body to the medical school at the University of California, Irvine (UCI), upon her death in July 1998, pursuant to a body donation agreement (Donation Agreement) she executed in 1993. The Donation Agreement did not require UCI to return Marie’s body to her relatives or other persons after scientific use, but instead assigned UCI responsibility for “final disposition of [her] body . . . in accordance with the State Code.” Following media reports in September 1999 concerning problems in UCI’s Willed Body Program (WBP), Marie’s son, James Whyte, and his wife, Pamela Whyte, separately sued the Regents of the University of California (Regents) on a number of different theories.¹ The trial court consolidated the couple’s cases, along with similar pending actions against the Regents, and James and Pamela each appeal from aspects of the trial court’s entry of judgment after sustaining demurrers to some of their causes of action and granting summary judgment on others.

Specifically, both James and Pamela contend the trial court erroneously sustained demurrers to their asserted claim UCI breached a contractual obligation to return Marie’s body to them after scientific use. Pamela, however, did not raise this issue. When the trial court sustained the Regents’ demurrer to the breach of contract claim in her second amended complaint *with leave to amend*, she declined to reassert *any* breach of contract claim in her third amended complaint. But James adequately raised the issue, contending UCI breached an implied contract “to keep records pertaining to the identification of cremated remains” for the purpose of returning them “to the proper

¹ For clarity and ease of reference, we refer to the members of the Whyte family by their first names, and intend no disrespect by this informality. (See *In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

family members[.]” Nevertheless, James’s contractual claim for return of Marie’s body fails for lack of consideration, as we discuss below.

James and Pamela also both contend the trial court erroneously granted summary judgment on their claim UCI misrepresented it would return Marie’s body to them after scientific use. But James’s misrepresentation claim did not survive the demurrer stage, and James does not challenge the trial court’s order sustaining the Regents’ demurrer to this cause of action. In any event, even construing an alleged misrepresentation UCI’s agent Christopher Brown made to James after UCI received his mother’s body as a commitment that the body would be returned, lack of reliance by either James or Pamela thwarts their misrepresentation claim on the merits.

Finally, both James and Pamela appeal the trial court’s entry of summary judgment disposing of their negligence claim. The gist of their claim is that when UCI failed to return Marie’s cremated remains to her family, the university breached the duty of care found applicable to mortuary and crematoria operators in *Christensen v. Superior Court* (1991) 54 Cal.3d 868 (*Christensen*). But Pamela’s negligence claim never made it past the demurrer stage, since the trial court concluded she was not in the class of plaintiffs covered by *Christensen*, and Pamela does not appeal that determination. In any event, as we explained in *Melican v. Regents* __ Cal.App.4th __ (May 23, 2007, G036583) __ Cal.App.4th __ (*Melican*), slip opn., pp. 11-12, *Christensen* does not apply to UCI’s WBP because UCI is not a mortuary or crematorium.² Absent a contractual basis for return of Marie’s body to her survivors or an actionable representation showing

² We note plaintiffs declined our invitation to submit supplemental briefing on *Melican* and our other recently-filed opinion arising from UCI’s WBP program, *Conroy v. Regents* (May 23, 2007, G035537) __ Cal.App.4th __ (*Conroy*).

UCI undertook a duty to return the remains, the asserted duty simply does not exist, and therefore James and Pamela's negligence claim fails.

As a variation on their negligence claim, plaintiffs argue the Regents breached a duty to refrain from interfering with James's right, as his mother's surviving next of kin, to arrange for final disposition of her remains. In support of these claims, plaintiffs rely on several provisions in the Health and Safety Code concerning a decedent's instructions for final disposition and for anatomical gifts. As we explain below, plaintiffs misinterpret the statutory sections on which they rely. Moreover, Marie's final instructions in the Disposition Agreement vested the right of final disposition unambiguously and as a matter of law with UCI, not James. Consequently, for all the foregoing reasons, we affirm the judgment in its entirety.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *James's and Pamela's Complaints*

John Stewart Whyte, Marie's husband and James's father, died in 1980 and was buried in one of two plots he and Marie purchased at Westminster Memorial Park Cemetery (Westminster Memorial). By 1993, based on her brother's example of donating his body to the willed body program at the University of California, San Diego, Marie decided to donate her body to science. She contacted the director of UCI's WBP, Christopher Brown, who sent her a preprinted Donation Agreement to sign.³ The form

³ The terms of the Donation Agreement provided: "I here state that it is my wish to donate my body to the Department of Anatomy and Neurobiology, California College of Medicine, University of California, Irvine (UCI), immediately following my death, for teaching purposes, scientific research, or such purposes as the said University or its authorized representative shall in their sole discretion deem advisable. My body, when delivered to UCI, will be unembalmed, unautopsied and intact. It is further

required two witnesses. Marie executed the form on March 20, 1993, and her son James and daughter, Charlotte Whyte, signed as witnesses. Marie then returned the form to Brown, after making copies for James and Charlotte. The form included a telephone number at the bottom and instructions to contact UCI “[w]hen death occurs”

Before Marie signed the Donation Agreement, James had expressed reservations about her decision. As James put it, “[W]ell, you know, someone passes away, they go to a UC medical system, and that’s it.” Pamela similarly felt uneasy with Marie’s choice, explaining, “I believe in closure, personally having a spot where you can go and remember them.” Marie was unpersuaded by these concerns. James nevertheless agreed to sign the Donation Agreement as a witness because “[y]ou have to know my mother, that she was going to do this anyway.”

Marie suffered chest pains on Saturday, December 12, 1998, and was admitted to Los Alamitos Medical Center. James noted his mother, who was 86 years old, “had had wonderful health all this time,” but she struggled through “two small heart attacks” and, given “the nature of her age, obviously, we were all afraid.” James called UCI and spoke with Brown. According to James, “Essentially, the message was call me when she passes away.”

Marie died on Tuesday morning, December 15th. That afternoon, James arranged to have his mother’s body transported to Westminster Memorial. The next day James paid the transportation costs, around \$282, and informed the Westminster Memorial staff of his mother’s donation decision. James had tried to contact Brown, but only reached his answering service. The record is not clear on this point, but James

understood and agreed that final disposition of my body by UCI shall be in accordance with the State Code.”

presumably left a message with Brown that Marie had died. Without notice to James or anyone in his family, UCI picked up Marie's body from Westminster Memorial.

James soon made another call to Brown, and this time reached him. Brown confirmed Marie's body had arrived at the WBP. According to James, Brown described "what would happen to [his] mother's remains" in the following manner: "[A]fter a year, year and a half of study, either her body will be cremated, ashes spread here at sea, or the ashes will be returned to" the family. According to James, he informed Brown "we obviously wanted the ashes back." Brown said nothing about a written request being necessary. Brown did not ask for James's contact information and James did not provide it.

On September 17, 1999, UCI issued a press release admitting problems in the WBP. The press release described how an ongoing internal WBP review "has already found deficiencies in the program's record-keeping and procedures, including inadequate documentation, which may have resulted in the program failing to return the remains of some of the donors to their families in accordance with their wishes, and possible financial irregularities." The release added that "UCI's review to date has not found any information to indicate that the bodies were used for any purposes other than education or research."

B. *Procedural History of James's Complaint*

James read a newspaper article that expanded on the press release with allegations of "misconduct" in the WBP and "mishandling" of bodies, and he soon joined a proposed class action filed against the Regents on September 27, 1999.⁴ That

⁴ The trial court eventually denied class certification because issues of fact particular to each decedent and plaintiff predominated.

complaint included claims for injunctive relief, breach of contract, negligent misrepresentation, negligence, breach of a special duty, and unfair business practices.

The complaint did not specify the manner in which a contract allegedly arose between James and UCI concerning his mother's body. Instead, the complaint simply alleged that an implied term of the contract was that Marie's body "would not be used for private gain; and . . . would be treated with dignity and respect and not be desecrated in any manner other than what was necessary to further teaching purposes and scientific research." The complaint also alleged UCI breached the contract "[b]y failing to keep records pertaining to the identification of [c]remains requested to be returned to the proper family members."

The gravamen of James's misrepresentation claim was that UCI, through its agents and/or literature, "represented that it would return, upon request and payment of the appropriate fee, all of the cremated remains of each decedent, and only those remains, to the care, custody and control of the family members designated to receive such [c]remains upon the completion of the cremation process."

For reasons not explained in the record, James substituted a first amended complaint for his initial complaint. The substance of his breach of contract and misrepresentation claims remained unchanged. The Regents demurred, and the trial court sustained the Regents' demurrer on all causes of action except, as relevant here, negligence based on an asserted duty of care owed to a decedent's family members, as recognized in *Christensen*. James eventually amended his negligence claim in a second amended complaint that, pursuant to the earlier demurrer, did *not* include claims for breach of contract or misrepresentation.

C. *Procedural History of Pamela's Complaint*

Meanwhile, Pamela had joined a complaint filed against the Regents by another group of UCI WBP plaintiffs on September 6, 2000.⁵ That complaint included causes of action for negligent misrepresentation, fraud and deceit, breach of contract, negligence, breach of a special duty, and intentional infliction of emotional distress. After a series of demurrers and amended complaints, Pamela's negligent misrepresentation, breach of contract, and negligence claims remained intact in a second amended complaint. She alleged a nearly identical negligent misrepresentation claim to the one eliminated on demurrer from James's first amended complaint, namely that the Regents, through their agents and/or literature falsely represented they would return Marie's cremated remains to her family.

Pamela's breach of contract claim, in contrast, presented a more complex theory than James's claims that the Regents had impliedly contracted to treat Marie's body with dignity and respect and that they would return the remains after scientific use and cremation. The Regents responded by demurring on grounds of uncertainty. The Regents protested: "At a minimum, it appears that at least three different theories have been pled: (1) breach of the donor agreement; (2) breach of [a] third-party [beneficiary] contract; and (3) breach of a promise to return cremated remains. . . . The confusion arises from the allegations about the circumstances surrounding the donations of the plaintiffs' respective decedents In some instances, the plaintiff's decedent allegedly entered into the donation agreement. In other instances, the plaintiffs, themselves, claim to have made the donation. Likewise, under the third theory, some plaintiffs allege that a specific agreement was made to return the cremated remains, while others merely allege

⁵ James tried to join this complaint too, but was excised by stipulation when the trial court learned of his pending action.

that they were entitled to be informed when final disposition had been made.” Because “it is not clear that *all* plaintiffs are suing on *all* theories, nor is it clear which plaintiffs are suing on a particular theory,” the Regents demurred to the second amended complaint as “uncertain, vague, and ambiguous” as to the breach of contract cause of action.

The Regents also demurred to Pamela’s negligence claim on grounds she was not among *Christensen*’s protected “close family members,” a term of art said to include “relatives residing in the same household, or parents, siblings, children, and grandparents of the victim.” (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 688, fn. 10; see *Christensen*, *supra*, 54 Cal.3d at pp. 875, 882, fn. 12, 896.)

The trial court sustained the Regents’ demurrer to Pamela’s negligence cause of action, without leave to amend. The court also sustained the demurrer to the breach of contract claim, *but allowed “10 days leave to amend . . . (last time)”* (Italics added.) In Pamela’s third amended complaint, three of her coplaintiffs reasserted with more clarity their breach of contract claim against the Regents, but Pamela did not join this portion of the complaint. Accordingly, as relevant here, the lone cause of action remaining for Pamela as her third amended complaint headed towards summary judgment was her negligent misrepresentation claim.

D. *Summary Judgment*

After the trial court consolidated the complaints James and Pamela had joined, the Regents moved for summary judgment on the claims in those complaints that had survived demurrer. For James, that was solely his negligence claim based on *Christensen* and, for Pamela, only misrepresentation.

The evidence the couple adduced in opposition to summary judgment included Pamela’s deposition testimony that Marie told her on one occasion UCI would

return her remains so “they could then be put in the plot next to her husband at Westminster.” According to Pamela, she heard the same thing from her husband and from Marie’s only other child, Charlotte Whyte.⁶ According to Pamela, Charlotte expressed relief that “[there]’d be closure when the remains were returned at the end of the time” for scientific use. But when asked at her deposition, “Did Miss Whyte say what she thought would happen[] to her body after UCI was done with it[,]” Pamela answered, “No.” Similarly, James testified his mother’s “understanding . . . as to what would happen to her remains,” if any, “wasn’t expressed to us.”

The Regents objected on hearsay and lack of foundation to Pamela’s testimony concerning the alleged statements made by others about expectations Marie’s body would be returned and interred at Westminster Memorial. The trial court sustained the objection,⁷ granted summary judgment on James’s and Pamela’s remaining claims, and they now appeal.

II

DISCUSSION

A. *Breach of Contract*

Plaintiffs contend the trial court erred in sustaining the Regents’ demurrer to their claim UCI breached a contractual obligation to return Marie’s body to them for final disposition after scientific use. As noted above, Pamela did not join her coplaintiffs in alleging breach of contract in her third amended complaint. James only alleged the Regents committed a breach by “failing to keep records,” but we treat this as having raised the breach-by-failure-to-return issue because James specified the purpose of

⁶ Charlotte is now deceased. The record is not clear as to when she passed away, but it was after her mother died.

⁷ James and Pamela do not contest this ruling on appeal.

recordkeeping was to honor requests that “cremated remains . . . be returned” to family members. (See *Skopp v. Weaver* (1976) 16 Cal.3d 432, 441 [complaint should be liberally construed]; see also *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1313 (*Morris*) [“we accept as true all facts properly pleaded along with those that might be implied or inferred”].) Because a demurrer tests the complaint’s legal sufficiency, our review is de novo. (*Morris*, at p. 1313..) Plaintiffs assert they were contractually entitled to return of Marie’s body both as third party beneficiaries of the Donation Agreement she executed and as a result of a direct contract they themselves formed with Brown. Neither theory states a viable claim here.

1. Third Party Beneficiaries of Marie’s Donation Agreement

Plaintiffs claim they are third party beneficiaries of the agreement reached by UCI and Marie concerning donation, use, and disposition of her body. Specifically, they contend the agreement’s disposition term, calling for UCI to dispose of the body “in accordance with the State Code” is ambiguous and therefore susceptible to parol evidence to show what UCI and Marie intended by that term. (See *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37; *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 (*Founding Members*); *Hayter Trucking, Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 20.) As plaintiffs phrase the issue, the ambiguity in the Donation Agreement entitles them to fill the gaps in the meaning of the agreement.

Based on statements Pamela claims Marie, Charlotte, and James made soon after Marie executed the Donation Agreement, plaintiffs contend UCI and Marie intended her family members would receive her ashes upon cremation of her body after scientific use. Specifically, Pamela claims Marie, Charlotte, and James made statements indicating

Marie understood — and presumably UCI intended also — that UCI would return her ashes to her family for interment in the plot next to her husband at Westminster Memorial. As plaintiffs point out, return of the ashes to the family is a disposition “in accordance with the State Code” because it is not forbidden by any statute. James and Pamela do not cite for our review UCI WBP literature advertising the possibility UCI would return a loved one’s body for final disposition, which might suggest UCI shared with Marie an understanding this would be the disposition in her case. Nor do plaintiffs suggest Marie was aware of the literature.

Nevertheless, the central defect in plaintiffs’ third party beneficiary theory is *not* the failure to cite UCI WBP literature. Rather, the trial court sustained, on foundational and hearsay grounds, the Regents’ objection to the statements Pamela claims she heard Marie, Charlotte, and James make concerning final disposition of Marie’s ashes at Westminster Memorial — *and plaintiffs do not attack this ruling on appeal*. Consequently, no evidence exists to support plaintiffs’ third party beneficiary claim based on their interpretation of the disposition term in the Donation Agreement.

Moreover, an additional fatal defect in the third party beneficiary theory is, as the Regents point out, Pamela herself admitted Marie never spoke to her of her understanding of the final disposition term. When asked at her deposition, “Did Miss Whyte say what she thought would happen[] to her body after UCI was done with it,” Pamela answered, “No.” Similarly, James testified his mother’s “understanding . . . as to what would happen to her remains,” if any, “wasn’t expressed to us.” A party is bound by admissions made in the course of discovery, including depositions. (*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.) Plaintiffs rely on Pamela’s recollection of her conversations with Marie, Charlotte, and James concerning Marie’s

understanding her ashes would be interred next to her husband. But, as discussed, those statements are not in evidence and, in any event, “[a] party cannot rely on contradictions in his own testimony to create a triable issue of fact.” (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 861.) Because no evidence exists to support plaintiffs’ third party beneficiary claim, and because their admissions contradict the basis for the claim, we conclude plaintiffs’ third party beneficiary claim is without merit.

2. Direct Contract Between UCI and Plaintiffs

Plaintiffs assert, as an alternative to their third party beneficiary claim, that they formed a direct contract with UCI for return of Marie’s ashes. They claim this contract arose in James’s conversation with Brown following Marie’s death, when James informed Brown “we obviously want[] the ashes back.” But James never asserted Brown promised to honor this request. A promise to perform is the very basis on which all contract law is premised, and James alleged no express promise. (See Civ. Code, § 1549 [“A contract is an agreement to do or not to do a certain thing”].) Even assuming — doubtfully — that James’s description of his conversation with Brown suggests Brown impliedly assented to James’s request, or impliedly agreed to later offer James the option to select between having Marie’s ashes returned to the family or scattered at sea, no consideration exists for either of these implied promises.

As we observed in *Conroy*, “It is axiomatic that consideration must support every contract.” (Slip opn., p. 13.) Consideration exists when, *as the result of a bargained-for exchange*, one party will obtain some benefit, or incur some detriment, as a result of the parties’ mutual promises. (Civ. Code, § 1605; *Peterson Tractor Co. v. State Board of Equalization* (1962) 199 Cal.App.2d 662, 670.) Plaintiffs argue James’s payment of \$282 to transport Marie’s body from Los Alamitos Medical Center to

Westminster Memorial constitutes consideration because it facilitated UCI's acquisition of the body. They claim a statute in force at the time required willed bodies first be transported to a mortuary before release to a WBP, but they do not identify that statute or explain its rationale.

Nor do plaintiffs provide record citations supporting their claim Brown directed James to arrange and pay for transportation to Westminster Memorial. Plaintiffs merely contend James's decision to do so supports the inference Brown had informed James that UCI could only pick up the body from a mortuary. According to plaintiffs, their payment of the mortuary's transportation fee elevated Brown's subsequent oral statement he would return Marie's remains to the dignity — and enforceability — of a contractual obligation. But even if we construe the evidence as supporting the inference Brown promised James he would return Marie's cremated remains at some future time, the consideration necessary to form a contract is absent for lack of bargained-for exchange. Simply put, there is no evidence James incurred the transportation costs *in exchange* for Brown's promise to return the remains after cremation.

Even based on James's strained assertion Brown made an implied promise in their telephone conversation to return the remains, James admits that "promise" did not come until after UCI already had possession of the body, having retrieved it from the mortuary. At best, James's payment of the \$282 to transport the body to the mortuary was a past, gratuitous act, undertaken laudably to fulfill his mother's wishes, assuming this step was a necessary prerequisite to a WBP donation. But this payment fails as a matter of law to establish consideration for an agreement. Simply put, so-called "past consideration" is not consideration at all. (*Passante v. McWilliam* (1997) 53 Cal.App.4th 1240, 1247 ["Past consideration cannot support a contract"].) Absent a bargained-for

exchange, there is no consideration (Civ. Code, § 1605), and absent consideration, there is no contract. (Civ. Code, § 1550, subd. (4); *Conroy*, slip opn. at p. 13.) Consequently, plaintiffs' breach of contract claim fails.

Alternatively, plaintiffs assert that James's statement "we obviously want[] the ashes back" met the requirement of consideration because it amounted to a promise to relieve UCI of its contractual final disposition obligation. As we explained in *Melican*, however, the very act of returning the ashes "would fulfill UCI's legal and contractual obligation to dispose of . . . remains" because "the law allows cremains to be disposed by . . . 'inurnment,' which is defined as 'placing cremated remains in a container suitable for placement, burial, or *shipment*.'" (*Melican*, slip opn. at p. 8 (italics added); see Health & Saf. Code, §§ 7009, 7011; all further statutory references are to this code unless otherwise noted.) Accordingly, the necessity of packaging the cremains to hand them over to James would itself satisfy UCI's disposition obligation. Thus, James's purported offer to relieve UCI of its disposition duty was an illusory promise and constitutes no consideration. (*Martin v. World Sav. & Loan Ass'n* (2001) 92 Cal.App.4th 803, 809 ["a contract is illusory where one party provides no legal consideration whatsoever"].)

B. *Negligent Misrepresentation*

Plaintiffs contend Brown negligently misrepresented to James that UCI would return Marie's cremated remains to them for final disposition. James and Pamela argue the trial court erroneously granted summary judgment on this cause of action. As noted above, however, James's misrepresentation claim was not among the issues adjudicated on summary judgment, having been excised when the trial court sustained the Regents' demurrer to his first amended complaint. An appellate court's first step in review of a summary judgment is to ""identif[y] the issues as framed by the

pleadings.”” (*Melican*, slip opn. at p. 16.) Accordingly, we need not review this issue with respect to James because the claim is nowhere in his second amended complaint, on which the trial court granted summary judgment.

Even assuming James’s misrepresentation claim had survived demurrer and proceeded to summary judgment, as Pamela’s did, as a matter of law neither claim had merit. “Negligent misrepresentation is a species of the tort of deceit and, like fraud, requires a misrepresentation, justifiable reliance and damage.” (*Melican*, slip opn. at p. 15.) “As with fraud, negligent misrepresentation requires actual reliance.” (*Conroy*, slip opn. at p. 12.) As evidence of their reliance on Brown’s alleged promise, plaintiffs point to their assistance “in the transfer of the body to Westminster Mortuary” But, in assisting the transfer, plaintiffs cannot be said to have detrimentally relied on a promise Brown had not yet made. Accordingly, the trial court’s summary judgment ruling was correct.

C. *Negligence*

Plaintiffs contend the trial court’s summary judgment ruling erroneously disposed of their negligence claim, which they premised on *Christensen*. As noted, however, the trial court sustained the Regents’ demurrer to Pamela’s negligence claim because she was not among the “close family members” entitled to relief in *Christensen*, and she does not appeal that determination. In any event, as we explained in *Melican*, slip opn., pp. 11-12, *Christensen* does not apply to UCI’s WBP because UCI is not a mortuary or crematoria operator. Moreover, absent a contractual basis for return of Marie’s body to her survivors or an actionable representation to that effect, a duty to return the body simply does not exist, and therefore James and Pamela’s negligence claim fails.

Taking another tack, plaintiffs argue that because the Donation Agreement was ambiguous concerning final disposition of Marie's remains, UCI had a duty to respect James's right, as the surviving next of kin, to dispose of his mother's remains however he chose, provided he did so "in accordance with the State Code." In other words, James, not UCI was "responsible for filling any empty holes" in the agreement. According to James, by not returning Marie's cremated remains, UCI breached a legal duty to refrain from interfering with his right to arrange his mother's final disposition.

We are not persuaded. The Donation Agreement is not ambiguous in the least concerning *who* retained the right of final disposition. The agreement provided expressly that "final disposition of my body *by UCI* shall be in accordance with the State Code." (Italics added.) Plaintiffs argue Chris Brown understood the Donation Agreement as they now urge, estopping UCI from a contrary construction. But interpretation of an unambiguous written agreement is a matter of law (*Founding Members, supra*, 109 Cal.App.4th at p. 955), and the Donation Agreement is patently clear on this topic. Plaintiffs' argument is therefore without merit.

Similarly unpersuasive is plaintiffs' reliance on the version of section 7100 in effect when Marie executed the Donation Agreement in 1993. Section 7100 then provided that "[a] decedent, prior to his death, may direct the preparation for, type or place of interment of his remains, either by *oral* or written instructions The person . . . otherwise entitled to control the disposition of the remains . . . shall faithfully carry out the directions of the decedent" (Italics added.) Armed with statutory recognition of the validity of oral instructions, plaintiffs contend Marie's alleged oral statements to Pamela, Charlotte, and James concerning interment of her ashes next to her husband rested on equal footing with the written Donation Agreement. In fact, because

the alleged instructions were specific on an issue left ambiguous by the Donation Agreement, plaintiffs contend the alleged oral instructions control.

There is nothing talismanic in the 1993 version of the statute. The law *still* allows a donor to amend an anatomical gift orally, provided he or she does so “in the presence of two individuals or by means of a tape recording in the donor’s own voice,” or through “[a]ny form of communication during a terminal illness . . . addressed to a physician or surgeon.” (§ 7150.5, subd. (f)(2) & (3).) But no statutory provision for oral instructions or modifications aids plaintiffs because the trial court sustained the Regents’ objection to Pamela’s parol evidence, and plaintiffs do not appeal that ruling. Thus, no evidence supports the argument that Marie orally modified, refined, or clarified the Donation Agreement and its provision charging UCI with arranging her final disposition in accordance with state law.

Finally, plaintiffs’ reliance on section 7100.1 is misplaced. Section 7100.1, enacted in 1997, reflects a legislative concern that surviving family members not be saddled with undue uncertainty or costs in fulfilling the statutory requirement that a decedent’s written disposition instructions “shall be faithfully carried out upon his or her death” (§ 7100.1, subd. (a).) The statute provides that the decedent’s instructions need only be carried out to the extent “the following requirements are met: (1) the directions set forth clearly and completely the final wishes of the decedent in sufficient detail so as to preclude any material ambiguity with regard to the instructions; and, (2) arrangements for payment through trusts, insurance, commitments by others, or any other effective and binding means, have been made, so as to preclude the payment of any funds by the survivor or survivors of the deceased that might otherwise retain the right to control the disposition.” (*Ibid.*) While terms in the decedent’s instructions not meeting

these requirements need not be fulfilled, “[a]ll other provisions of the directions shall be carried out.” (§ 7100.1, subd. (b).)

As we have explained, the Donation Agreement unambiguously vested the right of final disposition in UCI. Consequently, any ambiguity in the agreement concerning the manner of final disposition would provide UCI, not James or Pamela, with leeway in carrying out that term. Additionally, the agreement unambiguously reflected an intent to donate the decedent’s body to UCI. James and Pamela therefore did not have a basis for refusing to comply with that term for lack of clarity. (§ 7100.1, subd. (a)(1).) True, under subdivision (a)(2), James was not obligated to pay the \$282 to transport Marie’s body to Westminster Memorial, assuming she had not made arrangements with him to do so. But gratuitous payment of that fee does not somehow import into the Donation Agreement a term — return of the cremated ashes — for which James did not bargain. Because the Regents did not have a contractual duty to return Marie’s body to James, any statutory right to dispose of the body did not revert in him. Consequently, the Regents did not commit negligence by interfering with a nonexistent statutory right.

III

DISPOSITION

The judgment is affirmed. The Regents are entitled to their costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.